



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 2, 2005

Mr. Anthony S. Corbett
Freeman & Corbett, LLP
8500 Bluffstone Cove, Suite B-104
Austin, Texas 78759

OR2005-00971

Dear Mr. Corbett:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 218131.

The Chisholm Trail Special Utility District (the "district"), which you represent, received a request for (i) the average number of customers who use no water but are paying for a water meter; (ii) the units of measurement for 'the .6 rule'; and (iii) the number of million gallons of water that the district reserves by payment to BRA and LCRA. You contend that the district is not required to answer questions. In the alternative, you claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered your arguments and reviewed the submitted information, some of which consists of representative samples.¹

Initially, we note that the submitted information includes a document that was created after the date the district received the present request. Information created after the date the district received the present request is not responsive to the request and need not be released at this time. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986)

¹ We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(governmental body not required to disclose information that did not exist at time request was received).

Next, we address your contention that the district is not required to answer questions. The Public Information Act (the "Act") does not require the district to answer factual questions, perform legal research, create new information in responding to a request, or to produce information in a particular requested format. *See* Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989); *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 676 (Tex. 1995); *see also Fish v. Dallas Indep. Sch. Dist.*, 31 S.W.3d 678, 681 (Tex. App.—Eastland, pet. denied). Furthermore, the Act does not require a governmental body to disclose information that does not exist at the time a request is received. *See Econ. Opportunities*, 562 S.W.2d at 266. However, a governmental body has a duty to make a good faith effort to relate a request, including any factual questions, to information that it holds. *See* Open Records Decision No. 561 at 8 (1990). As you have submitted responsive information, we now turn to your claimed exception for this information.

Third, we note that a portion of the submitted information is made expressly public under section 552.022 of the Government Code. Section 552.022 enumerates several categories of information that are not excepted from required disclosure unless they "are expressly confidential under other law," and provides in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). The submitted information includes an executed contract related to the expenditure of funds by the district, which is subject to section 552.022(a)(3) of the Government Code. Pursuant to section 552.022, this executed contract is required to be released unless it is expressly confidential under other law. Section 552.103 of the Government Code constitutes a discretionary exception intended to protect the interests of a governmental body as distinct from exceptions intended to protect the interests of third parties or information deemed confidential by law. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general). Thus, this exception does not constitute other law that makes

information confidential for purposes of section 552.022. Accordingly, the executed contract may not be withheld pursuant to section 552.103.

We now turn to your arguments with respect to the remaining submitted information, which is not subject to section 552.022. Section 552.103 of the Government Code provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

For purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, to constitute "litigation." See Open Records Decision No. 588 (1991). In this case, you state, and provide documentation showing, that the requestor has sought a contested case hearing with the Texas Commission on Environmental Quality regarding the water rates adopted by the district in May 2004. Based on your representations and our review, we determine that litigation in this matter, in the form of a contested case under the APA, was pending prior to the date the district received the present request. We further find that the remaining submitted information relates to the pending litigation for purposes of section 552.103(a). We therefore determine that section 552.103 is applicable to the remaining submitted information.

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the case at issue is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the district must release the executed contract pursuant to section 552.022(a)(3) of the Government Code. The district may withhold the remaining requested information at this time pursuant to section 552.103 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

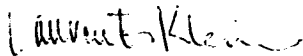
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Lauren E. Kleine
Assistant Attorney General
Open Records Division

LEK/jev

Ref: ID# 218131

Enc. Submitted documents

c: Mr. Russ Purcell
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(w/o enclosures)